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Supreme Court, U.S.
FILED

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IN THE

OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1993

JEAN ROSENBAUM,

Petitioner, acting Pro Se,

vs.

RICHARD ROSENBAUM and

ANN P. ROSENBAUM,

Respondents

PETITION FOR WRIT OF CERTIORARI

to the APPELLATE COURT OF ILLINOIS,

First District

PETITION FOR WRIT OF CERTIORARI

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52 pp

I. QUESTIONS PRESENTED FOR REVIEW.

1. Whether Respondents, RICHARD ROSENBAUM and ANN P. ROSENBAUM [1] forfeited their case by filing no documents or communications whatsoever in the Supreme Court of United States in the prior case, No. 89-1068 presented to that Court?

2. Whether JEAN ROSENBAUM [1] was/is entitled to have the judgments of the lower Illinois (Court(s) vacated and the case dismissed, when the proceeding, No. 89-1068, became moot in the Supreme Court of United States, after Respondents abandoned the case?

3. Whether the Appellate Court of Illinois, First District, erred by denying JEAN ROSENBAUM's request to vacate the Permanent Injunction Orders and dismiss the cause, when

it returned to the State Courts?

(4) Whether the Appellate Court of Illinois erred by overlooking and not ruling on the important issue presented; namely, "Does a parent have the legal right to investigate a report of an adult child's serious injury, dismemberment or death?

1/_____

In this document hereafter, RICHARD ROSENBAUM will be referred to as only RICHARD, ANN ROSENBAUM will be referred to as ANN (his wife), and JEAN ROSENBAUM, RICHARD's Mother, will be referred to as JEAN.

According to Court Records in the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois, Case No. 93 D 17, RICHARD and ANN were divorced in approximately April, 1993. The Appellate Court of Illinois, First District, was informed.

II. PARTIES TO THE PROCEEDING.

In the Circuit Court of Cook County, Illinois, Chancery Division, RICHARD and ANN were the Plaintiffs, and JEAN was the Defendant.

In the Appellate Court of Illinois, First District, JEAN has always been the Appellant, and RICHARD and ANN have been the Appellees.

In the Supreme Court of Illinois, JEAN was the Petitioner, and RICHARD and ANN were the Respondents.

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SUPREME COURT OF THE UNITED STATES

October Term, 1993

JEAN ROSENBAUM,

Petitioner, acting Pro Se,

vs.

RICHARD ROSENBAUM and

ANN P. ROSENBAUM,

Respondents

PETITION FOR WRIT OF CERTIORARI

to the APPELLATE COURT OF ILLINOIS,

First District

PETITION FOR WRIT OF CERTIORARI

Petitioner, JEAN ROSENBAUM, acting Pro Se, respectfully prays that the Supreme Court of United States issue a writ of certiorari to review the final

Order entered by the Appellate Court of Illinois, First District, on September 28, 1993, that denied Mother's request to vacate the Permanent Injunction Order(s), because of the abandonment of the case by RICHARD and ANN in MOTHER's prior attempt to appeal to the Supreme Court of United States, Case No. 89-1068. Here the case became moot as a result of the abandonment.

OPINIONS BELOW.

The Appellate Court of Illinois, First District, entered no Opinion, but entered the final Order in Rule 23 form under Ill. Rev. Stat. (1992), Supreme Court Rule 23, which permits an unpublished Order in lieu of Opinion. The office of the Clerk of that Court has informed MOTHER, however, that the Order was released for publication on February 16, 1994, but will NOT appear

in complete form, but merely as a Memo.

JURISDICTION

The final Order of the Appellate Court of Illinois, First District, was entered on September 28, 1993. A timely Petition for Rehearing was filed on October 19, 1993. The denial of the Petition for Rehearing by the Appellate Court was issued on November 5, 1993, and is set forth in APPENDIX B, A-(14). A Petition for Appeal As a Matter of Right, or in the Alternative, Petition for Leave to Appeal, was timely-filed in the Supreme Court of Illinois on December 10, 1993. The denial of the Petition for Appeal or for Leave to Appeal was issued on February 2, 1994, by the Illinois Supreme Court, and is set forth in APPENDIX C, A-(15).

This Court's jurisdiction is invoked under Title 28 U.S.C. § 1257(a)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Amendment V of the Constitution of the United States is set forth in APPENDIX D, A-(16). Amendment XIV of the Constitution of the United States is set forth in pertinent part in the APPENDIX E, A-(17).

No statutory provision is directly involved, or challenged.

The following Rules of the Supreme Court of the United States (eff. January 1, 1990) are involved: Rules 9.1, 9.2; Rule 12.4; Rule 15.5.

STATEMENT OF THE CASE.

The Appellate Court of Illinois, First District, had jurisdiction pursuant to Ill. Rev. Stat. (1989), Ch. 110-A, Par. 301.

The Federal questions were raised

in trial court initially in a MOTION RE SUPERSEDEAS AND STAY (Trial Court Record C.234). On page 3 of this Motion, Mother wrote: (Motion filed 8/24/90.)

> "Wherefore it is asked: (1) that a stay of proceedings be allowed until the change of venue issue has been resolved in some manner by the Appellate Court of Illinois, First District, and that it be allowed without bond or security being posted by Defendant; (2) that if security is required, that it be set in a minimal amount partially due to the subject matter, as well as Defendant's modest income as a substitute teacher when employment is available, and that she be allowed to post stock to serve as the supersedeas bond requirement. This is for the purpose of preserving her right to due process and equal protection of law under the United States Constitution Amendments V and XIV, and under the State of Illinois Constitution, Article I, Section 2."

In a MOTION PERTAINING TO AMENDED NOTICE OF APPEAL, filed September 4, 1990, in Paragraph (f), page 3, it was similarly requested that Mother be permitted to post stock if a supersedeas were required, because bondsmen

had consistently refused to provide a supersedeas bond to a Pro Se litigant (Trial Court Record C.251). At the end of Paragraph (f), she wrote:

> "This is for the purpose of preserving her right to due process and equal protection of law, under the United States Constitution, Amendments V and XIV, and under the Illinois Constitution, Article I, Section 2."

In a new, timely-filed Notice of Appeal filed May 31, 1991 (Trial Court Record C.386-C.397), on Page C.389, it was stated:

> "This appeal is taken because of the violation of Jean Rosenbaum's Constitutional rights under Amendments V and XIV of the United States Constitution, and under the Illinois Constitution, Article I, Section 2, in the trial court, where proper due process of law and process was denied her."

In its Order entered August 31, 1990, trial court denied the initial Motion re Supersedeas and Stay (Trial Court Record C.388). The Motion per-

taining to Amended Notice of Appeal, re supersedeas and stay, was denied in an Order entered September 6, 1990, (Trial Court Record C.388), and these denials were entered into the later Notice of Appeal filed May 31, 1991 (C.388).

In the Appellate Court of Illinois, First District, the Federal Constitutional issues were entered on Page 24 of her Brief, where she wrote:

> "As the United States Supreme Court merely denied certiorari, Mother sought vacation of the judgment below, which it denied. The lower courts are required to follow decisions of the U. S. Supreme Court (Citation), but will not. Mother is entitled to the same due process and equal protection of law in a state court, as afforded to a litigant in a federal court, United States Constitution, Amendments V and XIV, Illinois Constitution, Article I, Section 2. If it is the custom of the Supreme Court of United States to vacate the decree below and direct that the case be dismissed, when it has become moot, then the identical procedure should be available when the case is returned to a state court, after becoming moot."

Appellate Court rejected the Constitional argument totally; this is shown by its Order entered September 28, 1993, APPENDIX A, A-(9)-A-(10), A-(11).

On Page 19 of her PETITION FOR APPEAL AS A MATTER OF RIGHT, or in the Alternative, PETITION FOR LEAVE TO APPEAL, filed-timely in the Supreme Court of Illinois, Mother wrote:

> "This appeal lies to the Supreme Court of Illinois as a matter of right, it is believed, because of a question that appears to have arisen in Illinois for the first time under the Constitution of United States, Amendments V and XIV, and under the Constitution of the State of Illinois, Article I, Section 2."

The PETITION was denied, APPENDIX C, A-(15).

Additional Facts.

The roots of this case are in Mother's prior attempt to appeal to

the Supreme Court of United States, Case No. 89-1068, in an attempt to vacate the Permanent Injunction Order entered September 30, 1985 by Judge Benjamin Mackoff of the Circuit Court of Cook County, Illinois, as well as the Modified Injunction Order entered October 26, 1987, by Judge Thomas O'Brien of the same Court. The Order entered by Judge O'Brien has the effect of preventing her from seeing and talking to her son, RICHARD, (and his wife, then, ANN), on a permanent basis. 2

In Case No. 89-1068, contrary to United States Supreme Court Rules, RICHARD and ANN filed no documents

2/ The possibility exists that RICHARD was severely damaged physically, etc., when he performed a "top-secret" mission a number of years back, probably on behalf of the Government; Mother has no details.

whatsoever, nor did anyone file an appearance on their behalf; therefore, the case became moot and abated, under United States Supreme Court law. On February 26, 1990, the highest Court denied the Petition for Certiorari, and on April 23, 1990, denied Mother's Petition for Rehearing.

Due to the "mootness" that had developed in the U. S. Supreme Court, Mother returned to the Illinois Courts to have the Injunction Orders vacated, and the case dismissed. On July 5, 1990, she filed her complaint, a Petition, under Ill. Rev. Stat. (1989), Ch. 110, Sec. 2-1401, but before calling for hearing first sought a change of venue from Judge Thomas O'Brien, that he denied. The Section 2-1401 Petition described the mootness of the case that had developed in the U. S.

Supreme Court, and asked that the injunctions be vacated and the case dismissed. Other proceedings also took place, and eventually he denied the Section 2-1401 Petition, despite the abandonment of the case by RICHARD and ANN above, and the mootness that developed, APPENDIX G, A-(20). Also, other matters were denied.

Mother appealed his decisions to the Appellate Court of Illinois, First District, and that Court has totally affirmed the trial court decision(s) in its final Order entered September 28, 1993, APPENDIX A, A-(9)-(10); A-(13).

The origin of the Injunctions was a public announcement in Mother's presence that the body of her son, RICHARD, had been found dumped in Lake Michigan in the Chicago vicinity,

and her attempts to assure herself of his well-being. The September 28, 1993 Appellate Court Order gives more details about the background of this case, APPENDIX A, A-(2)-(5).

The Illinois Courts have consistently ignored and refused to rule on directly the issue presented by Mother several times in different aspects of this case -- If a parent has the legal right to investigate the report of an adult child's death, serious injury, or dismemberment?

According to court records of the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois, Case No. 93 D 17, pursuant to a Petition for Dissolution of Marriage filed January 5, 1993, RICHARD and ANN were divorced in April, 1993.

ARGUMENT.

Reasons for Granting the Writ.

Certiorari should be granted for several reasons: (1) The State Courts have decided an important question of federal law involving Rules of the Supreme Court of United States, in a way that conflicts with applicable decisions of this Court; (2) the decisions of the State Courts evidence that the Rules and the decisions of the U. S. Supreme Court are not taken seriously by the lower Courts, and this aspect needs to be settled by this Court; the citizens of this country need a reliable, consistent pattern of Rules and decisions with which to protect their rights. These rights cannot be adequately protected if they are not specifically described or ruled on.

The September 28, 1993 Order entered by Appellate Court gives as a reason for affirming the trial court decisions APPENDIX A, A-(10):

> "According to defendant, plaintiffs abandoned their case by failing to file an appearance or any other document in the United States Supreme Court. Defendant's argument is without merit since plaintiffs had no duty to file a brief in opposition to defendant's petition for certiorari."

Mother's Brief in Appellate Court, pages 21-25, as well as her Petition for Rehearing, pages 10-12, amply informed Appellate Court that no-one filed an appearance as attorney for RICHARD and ANN in the U. S. Supreme Court, as required by new Rule 9.2, if he represents a party who will NOT be filing a document, and neither ANN or RICHARD, or anyone else, responded to Mother's NOTICE of her belief that the parties below no longer had an interest in the outcome of the Petition,

as required by new U. S. Supreme Court Rule 12.4 (formerly old Rule 19.6). APPENDIX F, A-(18) is evidence of Mother's NOTICE to the highest Court of her belief that RICHARD and ANN no longer had an interest in the outcome of the case. The September 28, 1993 Appellate Court Order, and that Court's later ruling on the Petition for Rehearing, persist in ignoring or overlooking that evidence, and Mother's resulting rights, which it lacks jurisdiction to do. In Deakins v. Monaghan (1988), 484 U.S. 193, 199, 108 S.Ct. 523, 98 L.Ed. 2d 529, this Court said:

> "Article III of the Constitution limits federal courts to adjudication of actual ongoing controversies between litigants (citations). It is not enough that a controversy existed at the time the complaint was filed and review obtained. ...."

In S.E.C. v. Board of Trade (1982), 459 U.S. 1026, ___ S.Ct. __, ___ L.Ed. 2d __, it was ruled, when mootness occurred:

"Upon consideration of the suggestion of mootness filed by the petitioners, the petitions for writs of certiorari are granted, the judgments are vacated and the cases are remanded with directions to dismiss the petitions for review as moot."

Riley v. International Brotherhood of Teamsters (1949), 336 U.S. 930, 69 S.Ct. 737, 93 L.Ed. 1091, ruled when granting a Petition for Writ of Certiorari to Supreme Court of New Hampshire - "It appearing the cause has become moot, the judgment of the Supreme Court of New Hampshire is vacated, and the case remanded to that Court for proceedings as that Court may deem appropriate."

In Dyer v. City Council of Beloit (1948), 333 U.S. 825, 68 S.Ct. 450, when it appeared the cause had become moot, this court vacated the judgment of the Supreme Court of Wisconsin, and remanded for such further proceed-

ings as by that court may be deemed appropriate. People v. Lucente (1987) 116 Ill. 2d 133, 146, 506 N.E. 2d 1269, requires Illinois courts to follow the holdings of the United States Supreme Court, but this legal requirement has simply not been followed by the lower Illinois courts in this case. In Heflin v. United States (1959), 358 U.S. 415, 417, 79 S.Ct. 451, 3 L.Ed. 2d 407, when there was an apparent conflict between a decision and U.S. Supreme Court holdings in another case, that Court was impelled to grant certiorari. In Marine Engineers Beneficial Association v. Interlake Steamship Company (1962), 370 U.S. 173, 174-175, 82 S.Ct. 1237, 8 L.Ed.2d 418, again this Court granted certiorari to consider asserted conflict between State Court's decision and the

U. S. Supreme Court's holding in another case.

Daniels v. Williams (1986), 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed. 2d 662, determined:

> "The Due Process Clause of the Fourteenth Amendment provides 'Nor shall any State deprive any person of life, liberty, or property without due process of law. Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty or property.'"

In United States v. Salerno (1987), 481 U.S. 739, 746, 107 S.Ct. 2095, 95 L.Ed. 2d 699, the Court said:

> "The due process clause of the Fifth Amendment to the United States Constitution protects individuals against two types of government action: (1) 'substantive' due process prevents the government from engaging in conduct that (a) shocks the conscience, (b) or interferes with the rights implicit in the concept of ordered liberty ...."

It can be said that the Appellate Court, by ignoring RICHARD's and ANN's duty to abide by Rules of the Supreme

Court and decisions, to the detriment of Mother's cause, has used its powers arbitrarily, and this justifies the granting of this Petition for Writ of Certiorari.

In Santosky v. Kramer (1982), 455 U.S. 745, pt. 1-a, 102 S.Ct. 1388, 71 L.Ed. 2d 599, it was rightfully recognized --

> "Interest of natural parents (in their child or children) is a fundamental liberty protected under the Fourteenth Amendment."

The Illinois Supreme Court has reiterated the Santosky citation in In Re Enis (1988), 121 Ill. 2d 124, 128-129, 520 N.E. 2d 362, but the lower Courts possibly cannot fully understand this concept, and need to be guided into more equitable decisions. Mere "lip service" to the concept of the interest of aging parents in their children and family, such as Mother is, is not sufficient. It

appears, as the Appellate Court Order, for which ceriorari is sought, demonstrates, when it has ignored Mother's right to due process and equal protection of law under the circumstances aforedescribed. "Federal courts may enjoin unconstitutional action by state officials," Puerto Rico v. Branstad (1987), 483 U.S. 219, 228, 107 S.Ct. 2802, 97 L.Ed. 2d 187.

The Appellate Court has strongly aided in the destruction of the family ties in this troubled family situation, that is related to a divorce action the father of RICHARD filed against Mother on sketchy grounds, and this should not be allowed to further occur. "The Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and

tradition," Moore v. City of East Cleveland (1977), 431 U.S. 494, 503, 97 S.Ct. 1932, 52 L. Ed. 2d 531.

Mother again consistently attempted to find out if a parent has the legal right to investigate the report of an adult child's severe injury, dismemberment or death, and could get no ruling on the issue in the Illinois Courts. The matter had been introduced in her Section 2-1401 Petition (Complaint), (Trial Court Record C.51), but the document was denied. This right should be available to parents under Amendment XIV of the United States Constitution, but there appears to be no applicable decision.

Therefore, an explicit Order from the Supreme Court of United States that clearly requires the State Court(s) to vacate the Permanent Injunc-

tion Orders and dismiss the cause, is required, and requested.

CONCLUSION.

For the reasons set forth above, as well as others, a Writ of Certiorari to review the September 28, 1993 Order entered by the Appellate Court of Illinois, First District, should issue, and would be greatly appreciated.

DATED: May 3, 1994.

Respectfully submitted,

JEAN ROSENBAUM, acting Pro Se. *

* See Notarized Copy for original signature.

Second Division
September 2[illegible], 1993

No. 1-91-1811 C O P Y

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RICHARD ROSENBAUM and ANN P. ROSENBAUM, Plaintiffs-Appellees, v. JEAN ROSENBAUM, Defendant-Appellant, acting Pro Se.	Appeal from the Circuit Court of Cook County. No. 85 CH 5526 Honorable Thomas O'Brien, Judge Presiding.

O R D E R

The defendant, Jean Rosenbaum, appeals pro se, from the denial of her petition for relief from a judgment pursuant to section 2-1401 of the Illinois Code of Civil Procedure (Code). (Ill. Rev. Stat. 1989, ch. 110, par. 2-1401.) She raises the following issues on appeal: whether the trial court erred in denying her motion for change of venue; whether the permanent

injunction order and modification order are void and should be vacated; whether the trial court erred in denying her petition; whether the trial court exhibited strong prejudice against her; and whether her constitutional rights were violated by the trial court's decisions.

This cause arose from the complaint of plaintiffs Richard Rosenbaum, defendant's son, and Richard's wife, Ann, seeking a permanent injunction against defendant to restrain her from contacting plaintiffs by telephone at their home or at their places of employment, and from contacting any personnel at their places of employment. After a hearing on the complaint, the trial court (Judge Benjamin Mackoff) entered a permanent injunction on September 30, 1985, in favor of plaintiffs and against defendant enjoining defendant

from contacting plaintiffs. However, paragraphs four and five of the order did provide that plaintiff Richard Rosenbaum was to telephone defendant no less than once every three months, which conversation was to last for no less than one minute; and at least once a year Richard and defendant were to arrange to meet at a neutral place agreed upon by the parties. Subsequently, on October 26, 1987, the trial court entered (Judge Thomas O'Brien) an order vacating paragraphs four and five of the permanent injunction. Defendant filed a timely motion to vacate or modify the October 26 order or in the alternative to vacate the permanent injunction order entered in 1985. The motion was denied and defendant unsuccessfully appealed that decision. Rosenbaum v. Rosenbaum (1989), 184 Ill.

App. 3d 987, 541 N.E. 2d 872, cert. denied (1990), 494 U.S. 1004, 108 L.Ed. 2d 474, 110 S.Ct. 1297.

Defendant then filed a pro se petition pursuant to section 2-1401 of the Code (Ill. Rev. Stat. 1989, Ch. 110, par. 2-1401) asking that the above orders of the trial and appellate courts be vacated. Alternatively, she asked that the trial court determine whether a court has the authority to enter an order permanently enjoining a parent from seeing an adult child. After filing this Petition, defendant also filed a petition for change of venue on the ground that the trial judge who was to consider her petition was the same judge who entered the order modifying the permanent injunction, and he could not be fair and impartial. The court summarily denied both peti-

tions, and this denial is the subject of this appeal.

Defendant argues that the court erred in denying her motion for change of venue. The law provides that the right of a civil litigant to a change of venue based on an unspecified allegation of the trial court's prejudice is absolute where the petition is filed before trial or hearing and before the trial court has made any substantial ruling in the case. (Ill. Rev. Stat. 1991, ch. 110, par. 2-1001(a)(2).) If timely made, the right to a change of venue is mandatory, so that a trial court has no discretion to deny a timely and proper petition for a change of venue. Hartnett v. Stack (1993), 241 Ill. App. 3d 157, 167, 607 N.E. 2d 703.) However, once the judge has ruled on any substantial issue, the right to a change is no

longer absolute, but is a matter of discretion or subject to a specific showing of judicial prejudice. Yaw v. Beeghly (1982), 109 Ill. App. 3d 627, 631, 440 N.E. 2d 1066.

Neither party has cited case law that shows the automatic change of venue provision applies to post-judgment actions, such as defendant's section 2-1401 petition. However, in In re Marriage of Kozloff (1984), 101 Ill. 2d 526, 463 N.E. 2d 719, the supreme court rejected this court's holding that a change of venue can be sought on any post-judgment petition. In that case, the petitioner filed a petition to modify provisions of a dissolution of marriage judgment. He also moved for an automatic change of venue. The trial court denied the motion and the petition. The appellate court held that

the motion for change of venue should have been granted. The supreme court reversed, and rejected the reasoning that each post-judgment petition constituted a new proceeding for venue purposes. (Kozloff, 101 Ill.2d at 530.) The court stated:

> "We cannot accept the appellate court's position, because in our judgment it would lead to a serious abuse of the venue act. This court has long condemned a litigant's attempt to seek a change of venue after he has formed an opinion, based upon the court's adverse rulings, that the judge may be unfavorably disposed towards his cause. (Citation.) Under the appellate court rule, however, a change of venue can be sought on any post-decree petition if the litigant is dissatisfied with the judge's prior rulings on other, related petitions despite the fact that all of the petitions emanate from the same dissolution proceedings. Too, if after one change of venue on a particular petition, the litigant is still unhappy, he could replace the second judge simply by voluntarily dismissing his petition and refiling a substantially similar petition and another motion for change of venue.

> The venue act's prohibition against more than one change of venue (citation) would be rendered meaningless since, under the appellate court rule, the second petition would constitute a new proceeding. (Citation.) Taken to its logical extreme, a resourceful litigant could repeat the process until he found a judge he considered sympathetic to his cause. Obviously, such maneuvering is anathematical to the efficient use of judicial resources. (Citation.) Accordingly, we hold that post-decree petitions do not constitute new actions, but merely continuations of the dissolution proceeding, and a substantive ruling on one petition will preclude a change of venue as of right on another." Kozloff, 101 Ill. 2d at 530-31.

We find the situation in the instant case analogous to that in Kozloff. The proceeding that ultimately led to defendant's section 2-1401 petition was a permanent injunction issued in September 1985 restricting her contacts with her son and daughter-in-law. On October 26, 1987, Judge O'Brien confirmed the injunction order. Defendant then filed a motion to vacate or modify

the October 26 order. Judge O'Brien denied that motion, and this court affirmed. (Rosenbaum, 184 Ill. App. 3d 987.) After further attempts at appellate review, defendant filed the section 2-1401 petition, which was denied, and defendant brought the instant appeal. It is clear that the same concerns expressed by the supreme court in Kozloff exist in the present case. Accordingly, we hold that the trial court properly denied defendant's motion for an automatic change of venue.

Defendant next argues that the trial court's refusal to vacate the injunction was erroneous because plaintiffs abandoned the injunction in the United States Supreme Court, thereby rendering the injunction moot and abated. Defendant refers to the Supreme Court's dismissal of her petition for certiorari.

She states:

> "If it is the custom of the Supreme Court of the United States to vacate the decree below and direct that the case be dismissed, when it has become moot, then the identical procedure should be available when the case is returned to a State court, after becoming moot."

According to defendant, plaintiffs abandoned their case by failing to file an appearance or any other document in the United States Supreme Court. Defendant's argument is without merit since plaintiffs had no duty to file a brief in opposition to defendant's petition for certiorari. (Sup. Ct. R. 24, 398 U.S. 1037-38 (1969).) On the contrary, plaintiffs are entitled to rely on the permanent injunction order issued in September 1985 and modified in October 1987.

Defendant also contends that the permanent injunction order must be

vacated for the following reasons: (1) the conditions under which the original injunction was issued are ambiguous; (2) the order violates defendant's due process right to associate with family members; and (3) plaintiff's motion to modify the permanent injunction was improperly served on defendant (107 Ill. 2d R. 105(a),(b),(c)). A review of the permanent injunction order entered September 30, 1985, and the affirmance of that order in October 1987, indicates that the injunction is not ambiguous. Defendant's argument that the injunction must be vacated because it violates her constitutional rights is barred by the doctrine of res judicata, having been raised in her motion to vacate the October 26 order. (Lehman v. Continental Health Care, Ltd. (1992), 240 Ill. App. 3d 795, 608 N.E. 2d 303.) We are not persuaded

by defendant's argument that the October 26 order to modify the injunction was void because she was improperly served with notice of plaintiffs' motion to modify the injunction. A person seeking section 2-1401 relief must establish three elements: (1) the existence of a meritorious claim or defense; (2) due diligence in presenting the claim or defense to the lower court; and (3) due diligence in filing the petition for section 2-1401 relief. (Zimmerman v. Village of Skokie (1988), 174 Ill. App. 3d 1001, 1006, 529 N.E. 2d 599.) Here, the alleged improper notice pertained to the injunction entered in September 1985, yet defendant raises the issue of improper notice for the first time in her appeal of the trial court's denial of her section 2-1401 petition. Therefore, we find that

defendant is not entitled to section 2-1401 relief where she failed to exercise due diligence in filing the petition.

For the reasons stated above, the judgment of the circuit court is affirmed.

Affirmed.

SCARIANO, J., with HARTMAN, J., and DiVITO, J., concurring.

C O P Y

A-(14), APPENDIX B

APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RICHARD ROSENBAUM and ANN P. ROSENBAUM, Plaintiffs-Appellees,	)	
v.	)	No. 91-1811
JEAN ROSENBAUM, Defendant-Appellant.	)	COPY

ORDER

It is hereby ordered that defendant-appellant's petition for rehearing in the above-captioned case is denied.

(Signed) _____
JUSTICE ALLEN HARTMAN

(Signed) _____
JUSTICE ANTHONY SCARIANO

(Signed) _____
JUSTICE GINO L. DiVITO

Dated: November 5, 1993

ILLINOIS SUPREME COURT
Juleann Hornyak, Clerk
Supreme Court Building
Springfield, Ill.62706
(217) 782-2035

February 2, 1994

Ms. Jean Rosenbaum
1354 W. Greenleaf St.
Chicago, IL 60626

No. 76548 - Richard Rosenbaum et al., v. Jean Rosenbaum, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for appeal as a matter of right or leave to appeal in the above entitled cause.

The mandate of this court will issue to the Appellate Court on February 24, 1994.

C O P Y

UNITED STATES CONSTITUTION

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

A-(18), APPENDIX F

1354 West Greenleaf Street
Chicago, Illinois 60626

February 7, 1990

Clerk of the Supreme Court of the
United States
1 First Street, N.E.
Washington, D. C. 20543

Re: Rosenbaum v. Rosenbaum
No. 89-1068

Dear Sir:

I enclose herewith for filing a NOTICE PURSUANT TO SUPREME COURT OF THE UNITED STATES RULE NO. 19.6 (2 copies).[3] Please file, and acknowledge in the enclosed, self-addressed, stamped envelope.

Very truly yours,

(signed) Mrs. Jean Rosenbaum

Enc. 2

C O P Y

3/

NOTE: Rule 19.6 of the Supreme Court of the United States has been renumbered to Rule 12.4, effective January 1, 1990, but the wording of the applicable paragraph was left unchanged.

IN THE CIRCUIT COURT OF COOK COUNTY, ILL.
County Department, Chancery Division

RICHARD ROSENBAUM and)
)
ANN P. ROSENBAUM,)
)
Plaintiffs,)
)
v.) NO. 85 CH 5526
)
JEAN ROSENBAUM,)
)
Defendant, acting)
)
Pro Se.) C O P Y

ORDER

This cause coming on to be heard this 3rd day of May, 1991, on the (1) Post-Judgment (Trial) Motion to Vacate Order of March 18, 1991, presented by Jean Rosenbaum, Defendant, Plaintiffs' Answer thereto, and Defendant's Reply to Answer, and the Court having heard argument and been advised in the premises:

IT IS HEREBY ORDERED:

All parts of Defendant's Post-Trial Motion are denied as follows: (1) Motion to Add Amendment to Sect. 2-1401

Petition; (2) Denial of Section 2-1401 Petition (Complaint); (3) Motion to Vacate Modified Permanent Injunction and Dismiss Cause Because of Mootness, etc.

There is no just reason to delay enforcement or appeal of this Order.

ENTERED: May 3, 1991

T. O'Brien (139)

COPY

STATE OF ILLINOIS)
) SS
COUNTY OF C O O K)

AFFIDAVIT

I, JEAN ROSENBAUM, being first duly sworn upon oath, depose and state I am the Petitioner, acting Pro Se, in the aforestated cause, that I have read the foregoing Petition for Writ of Certiorari by me subscribed, that I know the contents thereof, and the same is true in substance and in fact.

Jean Rosenbaum

JEAN ROSENBAUM, Petitioner,
acting Pro Se

"OFFICIAL SEAL"
SIDNEY BARR
Notary Public Cook County, Illinois
My Commission Expires Sept. 29, 1995

Subscribed and sworn to before me, a Notary Public of the State of Illinois, County of Cook, this 3rd day of May, 1994.

Sidney Barr

Notary Public *

"OFFICIAL SEAL"
SIDNEY BARR
Notary Public Cook County, Illinois
My Commission Expires Sept. 29, 1995

* See copy marked "Notarized Copy" for original signatures.

Supreme Court, U.S.
FILED
JUN 14 1993
OFFICE OF THE CLERK

(2)

No. 92-1799

In the Supreme Court of the United States

OCTOBER TERM, 1992

VISITING HOMEMAKER & HEALTH SERVICES, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

DREW S. DAYS, III
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NORTON J. COMEN
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LINDA SHER
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

11 pp

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably determined that a nurse's direction of less-skilled employees in the exercise of professional judgment and as an incident of patient care does not make the nurse a "supervisor" under Section 2(11) of the National Labor Relations Act, 29 U.S.C. 152(11).

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1799

VISITING HOMEMAKER & HEALTH SERVICES, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. A1-A2) is unpublished, but the decision is noted at 989 F.2d 490 (Table). The decision and order of the National Labor Relations Board (Pet. App. A3-A11) is reported at 307 N.L.R.B. No. 90. The decision and direction of election in the underlying representation proceeding (Pet. App. A12-A19) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1993. Pet. App. A2. The petition

for a writ of certiorari was filed on May 11, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates a home health care agency from its facility in Mount Holly, New Jersey, providing in-home health care and personal, homemaker, and related services. Pet. App. A16. To deliver care to its clients, petitioner employs six registered and graduate nurses and 120 home health aides. *Ibid.* Responsibility for the overall management of petitioner's operations is vested in an Executive Director, a Director of Professional Services, and a Director of Human Resources. *Id.* at A17; C.A. App. 21a, 152a-154a. Petitioner also employs two coordinators who assist the Directors. Pet. App. A17-A18; C.A. App. 236a-248a.

When petitioner receives a request to provide service to a new client, the information obtained is given to the nurse assigned to the client's area, who visits the client at home, evaluates the client's needs, and prepares a nursing care plan. The care plan, which is subject to approval by the client's physician, is a list of recommended tasks and instructions for the client's family and for the nurse's aide pertaining to the home health care of the client. The nurse determines how many hours of service by an aide are appropriate for each client and how many days per week service should be provided. Pet. App. A16.

The aides are part-time employees who perform health care and related homemaker and personal services for petitioner's clients. The health care services include monitoring clients' temperatures, ad-

ministering medicine, turning bedridden patients, and aiding them in motion exercises. The homemaker services include housecleaning, laundry, sewing and mending, shopping, child care, running errands, and meal planning and preparation. The personal services include assisting the client in exercising and transporting the client for medical services. Pet. App. A16; C.A. App. 43a. On average, an aide spends two or two-and-a-half hours per visit in a client's home. C.A. App. 234a.

After the nurse has developed the care plan, a coordinator selects and assigns an aide to the client. Pet. App. A16. The nurse who prepared the care plan introduces the aide to the client, reviews the care plan with them, and instructs the aide on the proper procedures to be taken when caring for the client. C.A. App. 107a-109a, 181a-183a.

Nurses periodically visit the patients while the aide is present to assess whether the aide is properly carrying out the care plan and to hear the patient's concerns. The nurses discuss any shortcomings with the aides and report them to the coordinators or other management officials. The nurses, however, simply report infractions. Any discipline is imposed by the coordinators or higher management officials based on their own investigation. The nurses annually evaluate the aides' performance but their evaluations are not the basis for continued employment or wage increases. Pet. App. A17-A18.

2. In July 1991, the Jersey Nurses Economic Security Organization (the Union) filed a petition with the Board's Regional Office seeking to represent petitioner's nurses. Petitioner opposed the petition, contending that the nurses are supervisors within the

meaning of Section 2(11) of the Act, 29 U.S.C. 152(11), in light of the authority they exercised over the home health aides, and are therefore precluded from asserting the Act's protections of organizational activity.[1] Pet. App. A16.

The Regional Director determined that the nurses are not statutory supervisors. He discounted petitioner's designation of the nurses as supervisors, noting that "an employer's designation of an employee as a supervisor is not determinative of supervisory status." Pet. App. A18. The Regional Director then noted that, under Board decisions, a nurse's direction of less skilled employees based on the nurse's professional judgment and as an incident of the treatment of patients is not indicative of supervisory status.[2] Finding that the nurses' direction of the work of the aides in this case is "incidental to their patient care responsibilities," he concluded that such direction

---

[1] Section 2(3) of the Act, 29 U.S.C. 152(3), excludes from the definition of "employee," and hence from the Act's protections, any "supervisor." "Supervisor" is defined in Section 2(11), as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

[2] The Regional Director cited *Springfield Jewish Nursing Home*, 292 N.L.R.B. 1266, 1267 (1989); *Eventide South, a Division of Geriatrics, Inc.*, 239 N.L.R.B. 287, 289 (1978); *Sutter Community Hospitals of Sacramento, Inc.*, 227 N.L.R.B. 181, 193 (1976).

"does not confer supervisory status on the nurses." *Ibid.* Finally, the Regional Director found that the nurses have no real responsibility for hiring or disciplining aides, and do not effectively recommend changes in pay or tenure. *Id.* at A18-A19.

Accordingly, the Regional Director directed that an election be held in a unit of petitioner's nurses. Pet. App. A13-A14. The Board denied review of the Director's decision. *Id.* at A5 n.1. The Union won the election and was certified as bargaining representative of petitioner's nurses. *Id.* at A5.

3. Petitioner refused to bargain with the Union and to supply it with relevant information. The General Counsel issued a complaint charging petitioner with an unfair labor practice, and the Board entered summary judgment, ruling that petitioner had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), and ordered it to bargain with the Union.[3] Pet. App. A6.

The court of appeals, by judgment order, enforced the Board's order. Pet. App. A1-A2.

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[3] Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), makes it an unfair labor practice for an employer to refuse to bargain with its employees' bargaining representative. Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer to interfere with employee rights guaranteed by Section 7 of the Act, 29 U.S.C. 157, which include the right of employees to bargain through their chosen representative.

ARGUMENT

In determining that petitioner's nurses are not "supervisors" and that they are therefore entitled to bargain collectively through a union representative, the Board applied its long-standing rule that a nurse's direction of less-skilled employees, in the exercise of professional judgment and incidental to the nurse's treatment of patients, is not, by itself, sufficient to make the nurse a "supervisor" under Section 2(11) of the Act. 29 U.S.C. 152(11). Petitioner, acknowledging that "this issue of 'patient care' and its effect on supervisory status * * * is the heart of the instant petition" (Pet. 11), challenges the validity of the Board's rule. Pet. i, Question 1.[4]

While we believe that the Board's rule is a reasonable interpretation of the statute and accordingly is "entitled to deference from the courts," *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987), there is a conflict of decisions among the circuits that have addressed this issue. To resolve that conflict, we have recently filed a petition for a writ of certiorari seeking review of that issue. See *National Labor Relations Board* v. *Health Care &*

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[4] The second question presented by the petition asks whether the Board's rule "violate[s] the federal policy behind Section 2(11) of the National Labor Relations Act especially where the registered nurses provided the Employer's only on-site supervision for employees in the field." Pet. i. That reformulation of the issue does not raise a separate claim, but reflects a different way of presenting petitioner's contention that the Board's "patient care" rationale is an inadequate basis for finding that nurses with authority responsibly to direct other employees are not "supervisors" under Section 2(11).

Retirement Corp. of America, No. 92-1964 (filed June 8, 1993).[5] The decision in *Health Care & Retirement Corp.* presents a better vehicle for resolution of that issue than does this case, because, in that case the court of appeals issued a written opinion explaining its reasons for rejecting the Board's rule, and the decision discussed two prior circuit precedents examining the same issue. See 92-1964 Pet. 10, 16. In this case, in contrast, the court of appeals simply entered a judgment order. In addition, *Health Care & Retirement Corp.* presents a second significant question on which the circuits are divided: whether the Board permissibly requires the party who alleges that an employee is excluded from the Act's protections as a supervisor to bear the burden of proving the individual's supervisory status. 92-1964 Pet. I, 19-22. This case does not present that issue.

Accordingly, we believe that the Court should dispose of this petition as is appropriate in light of the Court's disposition of the petition in *Health Care & Retirement Corp.* If the Court grants the petition in that case, it should hold the petition here pending the outcome of that case. If the Court denies the petition in that case, it should deny the instant petition.

---

[5] We have provided a copy of our petition in No. 92-1964 to the petitioner in this case.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as is appropriate in light of the disposition of the petition for a writ of certiorari in *National Labor Relations Board* v. *Health Care & Retirement Corp. of America*, No. 92-1964.

Respectfully submitted.

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JUNE 1993

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